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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]125

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,

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THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. [redacted]127

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. [redacted]128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR CHEROKEE NATION.

EDGAR SMITH,
Attorney for the Cherokee Nation.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20237

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 419.

DANIEL RED BIRD ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, APPELLANTS,

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, APPELLANT,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE ET AL., INTERMARRIED WHITE PERSONS CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION, APPELLANTS,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, APPELLANTS,

vs.

THE UNITED STATES.

PRELIMINARY STATEMENT.

On February 24, 1903, the Secretary of the Interior addressed to the Court of Claims a request for the findings of fact and opinion relative to the claims of white persons inter-

married with Cherokee and other Indians incorporated into that nation. By that communication certain controverted questions which were pending in the Interior Department were submitted to the Court of Claims. That letter is as follows:

"DEPARTMENT OF THE INTERIOR, *Feb.* 24, 1903.

"To the Court of Claims:

"SIRS: By section 21 of the act of June 28, 1898 (30 Statutes, 498, 502), the Commission to the Five Civilized Tribes was directed to make rolls of citizenship of the several tribes, enrolling, among others, such intermarried white persons as may be entitled to citizenship under Cherokee laws. By the act of May 31, 1900 (31 Statutes, 221-236), said Commission was authorized to continue the exercise of authority heretofore conferred on it by law with a direction as follows: 'But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory, who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior.' By the act of July 1, 1892 (32 Statutes, 716-720), further direction was given as to the making of the rolls of citizens of the Cherokee Nation as follows:

"'SEC. 25. The rolls of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

" 'SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled, as provided in section 25 hereof, shall be placed upon the roll made by said Commission and no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen since the 16th day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

" 'SEC. 27. Such rolls in all other respects shall be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898, (30th Statutes, page

495), 'and the act of Congress approved May 31st, nineteen hundred, (31 Stats., page 221).

"A controversy has arisen as to the rights of white persons intermarried with Cherokee citizens and a protest has been filed with this Department on behalf of a large number of citizens of the Cherokee Nation by blood against the enrollment of intermarried persons 'so as to recognize their right to participate in the distribution of any of the common property of the Cherokee Nation of whatever kind or character.' It is asserted on the one hand that the Cherokee laws have never recognized the right of 'intermarried citizens' to share in the distribution of the property of the nation, and on the other hand that the Cherokee laws, as well as the laws of Congress, recognize those persons who have been married to Cherokee citizens in accordance with the laws of the Cherokee Nation relating to marriage as full citizens of such nation, entitled to share equally with the full-blood citizens in the property of the tribe.

"The controverted questions involved in this matter now pending before this Department are respectfully submitted for your findings and opinion in accordance with the provisions of section 2 of the act of March 3, 1883 (22 Statutes, 485). The protest referred to, which states the questions involved, is enclosed herewith, and upon receiving information that any other papers in the possession of the Department are needed they will be promptly transmitted.

"Very respectfully, E. A. HITCHCOCK,
"Secretary."

Thereafter, on April 13, 1903, certain individual Cherokee Indians, by their attorney, John J. Hemphill, Esq., filed in the said Court of Claims their petition praying that the court report its findings and opinion to the Secretary of the Interior to the effect that the Cherokee Nation has never granted to the persons claiming rights in said nation by intermarriage any right, title, or interest in or to any of the lands or vested funds of said nation.

Thereafter the "answer of certain citizens of the Cherokee Nation who claim citizenship by intermarriage" was filed.

On October 7, 1904, the Cherokee Nation by leave of court filed its intervening petition, averring in substance as follows:

As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States. Under and by virtue of the provisions of certain acts of Congress and the treaties between the United States and the Cherokee Nation of Indians and the patent by the United States to the Cherokee Nation issued the 31st day of December, 1838, as supplemented and interpreted by the treaty of 1846, the people of the Cherokee Nation of Indians now own the lands embraced within the boundaries of the Cherokee Nation, Indian Territory, which by recent acts of Congress are being allotted in severalty to the individual citizens of the Cherokee Nation, who are entitled to share therein.

The said Cherokee Nation as a body politic possessed and under the provisions of its treaties was granted the right of local self-government, with full authority to make and carry into effect such laws as it might deem necessary for the government and protection of persons and property within its jurisdiction belonging to its own people. In the exercise of this power the Cherokee Nation ordained and established a written code of laws. Prior to 1855 certain white persons had married with Cherokees, and such marriages, while recognized as binding, had given rise to serious questions respecting the status of such intermarried white persons and the jurisdiction of the nation over them. It was in this year, 1855, that the Cherokee National Council passed its first act "Regulating intermarriages with white men," which act is as follows:

"AN ACT REGULATING INTERMARRIAGES WITH WHITE MEN.

"Whereas, the peace and prosperity of the Cherokee people require that in the enforcement of the laws, jurisdiction should be exercised over all persons whatever, who may from time to time be privileged to reside within the territorial limits of this nation; therefore,

"Be it enacted by the National Council, That any unmarried white man desiring to marry a Cherokee woman shall be and is hereby required to obtain a license for the same from any of the clerks of the district courts of the several districts.

"Be it further enacted: That before any license, as provided above, shall be issued, the person applying shall be and is hereby required to pay to the clerk to whom application is made the sum of five dollars, and he is also required to take the following oath:

" 'I do solemnly swear that I will honor, defend and submit to the constitution and laws of the Cherokee Nation and will neither claim nor seek from the United States Government or its judicial tribunals any protection, privileges or redress incompatible with the same as granted to the Cherokee Nation by the United States in treaty stipulations entered into between them.'

"Be it further enacted: That all white men applying for licenses as provided in the first section of this act shall before obtaining the same, be required to present to the said clerk a certificate of good moral character, signed by at least seven respectable Cherokee citizens.

"Be it further enacted: That all judges of this nation and every regular minister of all evangelical denominations having the care of souls, are hereby authorized and empowered to solemnize the rites of matrimony according to the ceremonies usually observed and performed in such cases under the provisions of this act.

"Be it further enacted: That no marriage between a citizen of the United States and a female citizen of this nation, entered into within the limits of this nation, except as hereinbefore authorized and provided, shall be legal; and any judge or minister who shall engage or assist in solemnizing any such marriage shall, upon conviction before any district court in this nation, be fined one hundred dollars, and it shall be the duty of the solicitor of the district in which such judge or minister may reside to collect the same, who shall be entitled, for his services, to twenty per cent. of the amount collected and who shall place the remainder in the hands of the national treasurer for public benefit.

"Be it further enacted: That persons performing a marriage ceremony under the authority of a license, provided for above, shall be required to attach a certificate of marriage to

the back of the license, which shall be returned. The holder of the license and the certificate shall then place the same in the hands of the clerk of the district court, whose duty it shall be to record the same in his office.

"Be it further enacted: That any white citizen of the Cherokee Nation by marriage, etc., who shall use the intercourse law or laws (as they are termed) in the prosecution of a Cherokee Indian for any criminal offence committed within the limits of the Cherokee Nation, shall forfeit his right of citizenship to the same and be subject to be dealt with as other white intruders in the country and shall be removed out of this nation.

"Be it further enacted: That should any white man or woman become a citizen of the Cherokee Nation by marriage and be left a widow or widower by the decease of the Cherokee wife or husband, such surviving widow or widower shall continue to enjoy Cherokee privileges, unless such white widow or widower shall marry a white man or woman (as the case may be), then, in that case, all of his or her right to Cherokee citizenship shall cease.

"Be it further enacted: That any white man who shall lawfully marry under the provisions of this act and then or afterwards abandon his wife shall not be entitled to any of the rights and privileges of a citizen of the Cherokee Nation and shall be and is hereby considered and shall be removed as an intruder."

October 15, 1855.

In pursuance of this policy the Cherokee Nation continued to exercise political control over such persons, exacting allegience of them as citizens of a body politic subject to its government, and extending to them civil, political, and personal rights, which include the right to vote and participate in the affairs of the nation, to reside within its limits, to trade, and use the public domain.

There is no word in the act which confers upon the intermarried white citizen the right in either the lands or the vested funds of the Cherokee Nation.

To make it more clear that substantial rights, other than property rights, were conferred by the act, and that they were recognized prior to the act, it should be borne in mind that

the United States had always promised to keep the country occupied by the Cherokee Indians free from the intrusion of the white man.

"SECTION 2134. Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent or subagent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

"SECTION 2135. Every person other than an Indian who, within the Indian country, purchases or receives of any Indian in the way of barter, trade or pledge, a gun, trap or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with white people, or any article of clothing except skins or furs, shall be liable to a penalty of fifty dollars.

"SECTION 2147. The superintendent of Indian affairs and the Indian agents and subagents shall have authority to remove from the Indian country all persons found therein contrary to law, and the President is authorized to direct the military force to be employed in such removal.

"SECTION 2148. If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

Act of Congress 30th June, 1834; Revised Statutes of the United States, pages 372-374.

The treaty of 1866 provides as follows:

"All persons not in the military service of the United States, not citizens of the Cherokee Nation, are to be prohibited from coming into the Cherokee Nation or remaining in the same, except as herein otherwise provided; and it is the duty of the United States Indian agent for the Cherokees, to have such persons not lawfully residing or sojourning therein, removed from the nation as they now are or hereafter may be required by the Indian intercourse laws of the United States."

Even as late as the convention of 1893, between the United States and the Cherokee Nation, providing for the sale of what is known as the Cherokee Outlet, it is provided in article 2 as follows:

"First. That all persons now resident, or who may hereafter become residents in the Cherokee Nation, and who are not recognized as citizens of the Cherokee Nation by the constituted authorities thereof, and who are not in the employment of the Cherokee Nation or in the employment of the citizens of the Cherokee Nation in conformity with the laws thereof, or in the employment of the United States Government, and all citizens of the United States who are not residents in the Cherokee Nation under the provisions of treaties or acts of Congress shall be deemed and held to be intruders and unauthorized persons within the intent and meaning of section 6 of the treaty of 1835 and sections 26 and 27 of the treaty of July 19, 1866, and shall together with their personal effects be removed without delay from the limits of the said nation by the United States as trespassers, upon the demand of the principal chief of the Cherokee Nation. On such removal no houses, barns, outbuildings, fences, orchards, growing crops or other chattels real, being attached to the soil and belonging to the Cherokee Nation or the owner of the land, shall be removed, damaged or destroyed, unless it shall become necessary in order to further the removal of such trespassers."

The act of the Cherokee National Council of 1855, above set out, remained unchanged until 1874, when the Cherokee National Council adopted a new code, which contained among other things a provision relating to intermarriage, which provision is set out *in extenso*, beginning near the close of page 16 of the record. Section 75 of this act of 1874 carries a provision as follows:

"Provided also that the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general funds of the national treasury a sum of money, to be ascertained and fixed by the National Council equal to the *pro rata* share of each native Cherokee in the

lands and vested wealth of the nation, estimated at five hundred dollars, and thereafter conform to the constitution of the nation and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent and be entitled to all the rights of other Cherokees."

The constitution of the Cherokee Nation of 1839, in regard to the authority of the National Council to admit to citizenship, remained unchanged by the amendments to the constitution in 1866, and the council was by constitution limited in authority to the *readmitting* of persons who had once been citizens of the Cherokee Nation.

Record, page 39.

Under this act of 1874 but two persons took advantage of said act, and neither of those persons is a party to this suit, and none of the said intermarried persons who are parties to this suit paid or offered to pay into the general fund of the Cherokee Nation the sum of $500 or any other sum estimated as equal to the *pro rata* share of each Indian Cherokee in the lands and vested wealth of the Cherokee Nation.

Record, page 45.

The act of 1874, passed on December 5 in said year, but which did not take effect until November 1, 1875 (Record, page 40), was on the 28th day of November, 1877, amended by the National Council of the Cherokee Nation by striking out of the provision quoted from section 75 thereof everything after the words "this nation," where said words occur in the third line of such proviso of said section, so that said proviso remained after its amendment as follows:

"Provided also that the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation."

Record, page 52.

On November 29, 1878, the Cherokee National Council passed the following act:

"Be it enacted by the National Council, That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and they are hereby readmitted into the rights and privileges of the Cherokee Nation: *Provided,* That the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation."

Record, page 57.

December 3, 1878, the Cherokee National Council made the following enactment:

"Be it enacted by the National Council, That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens."

Concurred in by council with the following amendment:

"Provided that David N. Allen, the petitioner, shall not acquire any rights except such rights as attach to white men adopted citizens of (the) Cherokee Nation."

The act of the Cherokee National Council of November 27, 1880, relative to the marriage of other Indians than Cherokees with Indian citizens of the Cherokee Nation provides that the marriage shall be conducted according to the law regulating marriages between "our own citizens," but when this is done the Indian *so* married shall be "deemed a Cherokee citizen to all intents and purposes and entitled to all rights of other Cherokees."

Record, page 52.

In 1880 the National Council passed an act requiring additional evidence of the good moral character of the white men desiring to marry an Indian; also the payment of five dollars additional.

Record, page 52.

In 1890 the National Council passed a further act providing for the forfeiture of intermarried white's status upon certain conditions.

There has never been any act passed by the National Council of the Cherokee Nation attempting to grant property rights to an intermarried white person, except that provision of the act of 1874 which was taken advantage of by two individuals who are not parties to this suit, and that provision pointed out the way by which an intermarried white citizen could obtain property rights in the Cherokee Nation and which has no application to the parties to this suit, who base their claim solely upon the fact that they were made citizens of the Cherokee Nation.

As a matter of fact, the provision of the act of 1874 extending the privilege of purchasing the right in the nation did not take effect until November 1, 1875, and was repealed by the National Council, November 28, 1877, as hereinbefore shown.

From 1875 to 1877 the act of the National Council prescribed the rule of action and pointed out the way by which a property right could be acquired. In 1877 this provision was stricken out, leaving the express declaration that "the rights and privileges herein conferred shall not extend to the right of soil or interest in the vested funds of this nation."

The act of 1855 did not grant such interest, but after the experience of 1874 the express negative of such possible contention might have been thought necessary by the Indian in his effort to keep the remnant of land which he then held. With this *notice* of the limitation, always in existence, the law has remained unchanged in this particular.

Section 5 of the constitution of 1839 is as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either

by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

Section 5, as amended in 1866, reads as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

Laws of the Cherokee Nation, 1892, pages 14 and 33.

The Cherokee Nation in 1880 provided for the taking of the census, which act is found at page 53 of the record. This was a census. It carried descriptive matter appended to each name, showing how each person became a citizen of the Cherokee Nation. The descriptive matter was adopted with the roll.

June 28, 1898, Congress made an enactment directing the Commission to the Five Civilized Tribes, in making rolls of citizenship of the Cherokee Nation, "to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress and to enroll all persons now living whose names are found on said roll * * * with such intermarried white

persons as may be entitled to Cherokee citizenship under Cherokee laws."

July 1, 1902, Congress passed an act which was ratified by the Cherokee Nation and which carried the following provisions:

"SECTION 25. The roll of citizens of the Cherokee Nation shall be made as of September 1st, 1902, and the names of all persons then living and entitled to enrollment on that date, shall be placed on said roll by the Commission to the Five Civilized Tribes.

"SECTION 26. The names of all persons living on the 1st day of September, 1902, entitled to be enrolled, as provided in section 25 hereof, shall be placed upon the roll made by said Commission and no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen since the 16th day of December, 1895, shall be entitled to enrollment or to participate in the distribution of tribal property of the Cherokee Nation. (Sec. 27.) Such roll in all other respects shall be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Statutes, page 495), and the act of Congress approved May 31, 1900 (31 Statutes, page 221).

"SECTION 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of the lands as herein provided, the said Commission shall from time to time, as soon as practicable, forward to the Secretary of the Interior lists, upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which the allotment of lands and distribution of other tribal property shall be made."

This statement reviews, in the main, the history of the legislation of the nation, relating to the status of the white citizen, and leads up to and includes those recent acts of Congress upon which the final division of the properties of the Cherokee people depend. But there are some additional facts which have occurred from time to time and which are im-

portant to a proper understanding of the status of the white intermarried citizen in the Cherokee Nation. Ever since the enforcement of what is known as the new code in the Cherokee Nation, on November 1, 1875, a law permitting suit against the nation by any of its members has been in force, which law is fully set forth on page 29 of the record.

No action at law or suit in equity was ever brought under the act respecting the liability of the nation to her own citizens, founded on sections 130, 131, 132, and 133, inclusive, under chapter 26, New Code (1875), for or on behalf of any intermarried person asserting any claim to a share or interest in the funds or any portion thereof which had been distributed since 1875.

Record, page 57.

An Indian woman named Pauline Shannon, claiming rights of property as such, married prior to January 1, 1895, to a white man named George Shannon, in accordance with the laws of the Cherokee Nation governing intermarriage of white men and foreigners, and S. M. Barbee, a Cherokee Indian by blood and claiming rights as such, married Samuel Barbee, a white man, prior to January 1, 1895, in accordance with the laws of the Cherokee Nation governing intermarriage of white persons and foreigners. In the year 1895 the said Pauline Shannon and the said S. M. Barbee, each for herself, and the first named for her children also, brought suit against Stephen Tehee, as assistant and acting chief of the Cherokee Nation, under the provisions of the act aforesaid, demanding a distributive share for themselves, and Pauline Shannon for her children also, in the funds distributed by the nation theretofore, and judgment was rendered in favor of said parties and against the Cherokee Nation in the circuit court of said nation, and upon appeal to the supreme court of the Cherokee Nation that judgment was affirmed. At the time said suits were instituted and during the pendency of each in the courts of the nation and at the time final judgment

was rendered, both George Shannon and Samuel Barbee were intermarried white persons and husbands of the said Pauline Shannon and S. M. Barbee respectively, and each lived with his wife and was acknowledged as a citizen of the Cherokee Nation by intermarriage. Neither of those men had participated in the distribution of said funds. Neither of these were parties to either suit, nor did either of them make application to be made a party, nor was any claim made theretofore, nor has there been since, on behalf of either of them for a distributive share of said funds or any portion thereof under said law.

Record, page 58.

The citizenship of the Cherokee Nation is made up as follows: The Cherokees, the Delawares, the Shawnees, the freedmen, and the intermarried whites. The Cherokee Nation received a patent to the lands now within the limits of the Cherokee Nation, Indian Territory, December, 1838.

The Cherokee constitution, section 20, article 3, declares that treaties shall be the supreme law of the land.

On the 19th day of July, 1866, a treaty was entered into between the United States and the Cherokee Nation, containing the following provision:

"ARTICLE 15. The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees residing in the Cherokee country, they shall be incorporated into and ever remain a part of the Cherokee Nation on equal terms in every respect with said native citizens. And should any such tribe

thus settling in said country decide to preserve their tribal organizations and maintain their tribal laws, customs and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district or country set off for their use by metes and bounds, equal to one hundred and sixty acres if they should so decide, for each man, woman and child of said tribe and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price is to be fixed by the President. And the said tribe thus settled shall also pay into the national fund a sum of money to be agreed upon by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees." * * *

Record, page 23.

On the 8th day of April, 1867, articles of agreement were made between the Cherokee Nation and the Delaware tribe of Indians, which contained, among other things, the following provisions:

"Whereas, by the 15th article of a certain treaty between the United States and the Cherokee Nation, ratified August 11, 1866, * * * now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows: The Cherokees, parties of the first part, for and in consideration of certain payments and the fulfillment of certain conditions, hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land, * * * nor shall the continued ownership or occupancy of said land by any Delaware so registered, be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon citizens thereof. On the fulfillment by the Delawares of the foregoing stipulations all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities and the same

participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided. And the children born to such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

On June 7, 1869, there was a like agreement between the Cherokee Nation and the Shawnees. In the case of the freedmen nothing was paid, because their incorporation with the Cherokees was enforced by the United States as a condition to the continued existence of the Cherokee Nation.

"At the close of the Civil War the Cherokee territory was conquered territory and the Cherokee Nation at the mercy of the United States." (Whitmire *vs.* Cherokee Nation, 30 Court of Claims Reports, 138-150.)

It may be stated here that after this case was submitted to the Court of Claims, as hereinbefore set forth, there was made an enactment by Congress as follows:

"That in the case entitled 'In the matter of enrollment of persons claiming rights in the Cherokee Nation by intermarriage against the United States,' departmental, numbered 76, now pending in the Court of Claims, the said court is hereby authorized and empowered to render final judgment in said case, and either party feeling itself aggrieved by said judgment shall have the right of appeal to the Supreme Court of the United States, within thirty days from the filing of said judgment in the Court of Claims. And the said Supreme Court of the United States shall advance said case on its calendar for early hearing." (Act 3rd March, 1905, 34 Stats. L., page —.)

Record, page 36.

Upon the foregoing facts the Court of Claims concluded as matters of law as follows:

"Conclusions of Law.

"That such white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the first day of

November, 1875, are equally interested in and have equal per capita rights with the Cherokee Indians by blood, in the lands constituting the public domain of the Cherokee Nation and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the United States by the patent of December, 1838; that the rights and privileges of those white persons who intermarried with Cherokee citizens subsequent to the first day of November, 1875, do not extend to the right of soil or interest in any of the vested funds of the Cherokee Nation and such intermarried persons are not entitled to share in the allotment of lands or in the distribution of any of the funds belonging to said nation and are not entitled to be enrolled for such purpose; that those white persons who intermarried with Delaware or Shawnee citizens of the Cherokee Nation either prior or subsequent to November 1, 1875, and those who intermarries with Cherokees by blood and subsequently being left widow or widower by the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood and those white men who having married Cherokee women and subsequently abandoned their Cherokee wives shall have no part or share in the Cherokee property and are not entitled to participate in the allotment of the lands or in the distribution of the funds of the Cherokee Nation or people, and are not entitled to be enrolled for such purpose. By the Court."

BRIEF.

Upon these facts it is contended:

I.

THAT WHITE PERSONS WHOSE SOLE CLAIM IS BASED UPON INTERMARRIAGE ARE NOT ENTITLED TO BE INCLUDED IN THE DISTRIBUTION OF THE LANDS AND VESTED FUNDS OF THE CHEROKEES:

(*a.*) Because they have not acquired, by treaty or contract, any interest therein.

(*b.*) Because the laws, usages, and customs of the Cherokees exclude them, and make a positive distinction between the rights of citizens, as understood by the Indians, and the privileges extended to and enjoyed by intermarried whites residing among them.

Act, October 15, 1855 (Record, page 50).
New Code Laws, 1875 (Record, pages 51 and 55).
Act, November 28, 1877 (Record, page 52).
Act, December 11, 1880 (Record, page 52).
Act, December 6, 1890 (Record, page 55).
Treaty, July 19, 1866 (14 Stats., page 799).
Agreement with Delawares (Exhibit A, page 277, Record, page 56).
Agreement with Shawnees (Exhibit A, page 281, Record, page 56).
Act, November 29, 1878 (Record, page 57).
Act, December 3, 1878 (Record, page 57).
Act, April 27, 1886 (Record, page 56).
Act, November 27, 1880 (Record, page 52).
Act, May 19, 1883 (Record, page 56).

(*c.*) Because the National Council of the Cherokee Nation was not authorized by the constitution thereof to grant a right to soil or interest in the vested fund.

Record, pages 39, 40.

(*d.*) Because those who have intermarried subsequent to January 1, 1875, are expressly excluded from any right to soil or interest in the vested funds.

New Code, 1875 (Record, pages 52 and 55).
Act, November 28, 1877 (Record, pages 52 and 55).

(*e.*) Because this distinction has been known to, accepted, and acquiesced in for more than fifty years by the intermarried whites residing in the Cherokee Nation.

Act, October 15, 1855 (Record, page 50).
Constitution of 1839 (Record, page 39).
Act, November 28, 1877 (Record, page 55).
Act of Congress, October 1, 1890 (26 Stats., 636).
Act of Congress, June 28, 1898 (30 Stats., 495).
Stephens *vs.* Cherokee Nation, 174 U. S., 488.

(*f.*) The claim is not based on any consideration, is unconscionable, inequitable, and unjust to the Indians.

Journeycake *vs.* Cherokee Nation, 28 C. Cls., 281.
Treaty, May 28, 1828 (7 Stat., page 313).

II.

THE LAWS OF CONGRESS RECOGNIZE IN INTERMARRIED WHITE PERSONS THOSE RIGHTS AND NONE OTHER TO WHICH THEY ARE ENTITLED UNDER THE LAWS, USAGES, AND CUSTOMS OF THE CHEROKEES:

Act, March 3, 1893 (27 Stats., page 645).
Act, June 10, 1896 (29 Stats., page 321).
Act, June 7, 1897 (30 Stats., page 62).
Act, June 28, 1898 (30 Stats., page 495).
Act, May 31, 1900 (31 Stats., page 170).
Act, July 1, 1902 (32 Stats., page 716).
Stephens *vs.* Cherokee Nation, *supra.*
Mackey *vs.* Coxe, 18 Howard, 102.
Delaware Indians *vs.* Cherokee Nation, 193 U. S., 144.
Cherokee Trust Funds Case, 117 U. S., 311.
Minnesota *vs.* Hitchcock, 185 U. S., 396.

ARGUMENT.

THE STATUS OF THE INTERMARRIED WHITE CITIZEN IN THE CHEROKEE NATION AS DEPENDENT UPON:

FIRST. THE ACTS OF THE CHEROKEE NATIONAL COUNCIL.

SECOND. THE CONSTITUTION OF THE CHEROKEE NATION.

THIRD. THE ACTS OF CONGRESS.

I.

FIRST. THE ACTS OF THE CHEROKEE NATIONAL COUNCIL.

The intermarried whites, so called, claim property rights in the Cherokee Nation solely by virtue of their intermarriage with Indian citizens thereof. They assert that their rights to Cherokee lands and funds spring from citizenship. These claimants must rest upon the question of what is the effect of citizenship in the Cherokee Nation, for it cannot be said that they have acquired the right to share in the lands of the Cherokee people or in their funds by any grant conveying such rights in express terms. Just here is the difficulty which confronts them and which inheres in the situation. When called upon to say just where they stand and by what particular grant they expect to acquire a property interest in the lands and moneys of the Cherokee Nation, it is submitted that the answer cannot be satisfactory. Whether the right is claimed by virtue of the acts of the Cherokee National Council, or by virtue of the Constitution of the Cherokee Nation, or under acts of Congress, or by all combined, the dominant fact recurs that nowhere and at no time have these claimants been given any interest in the lands and money of the Cherokee Nation in express terms.

It has been asserted by these claimants—and their lan-

guage will be quoted as portraying the character of the claim:

"If we take the acts of the Cherokee Nation alone we find that in 1875, and from 1880 to 1895, intermarried whites unquestionably acquired rights of property by intermarriage; and that from 1875 until 1880 we submit they did also by virtue of subsequent legislation of the nation, the constitution, and the agreement, and the acts of Congress, particularly those whose names are on the 1880 roll."

Brief on behalf of claimants by intermarriage, Court of Claims, page 187.

In the light of the history of the laws of the Cherokee Nation, as well as the legislation of Congress upon this subject, no better illustration of the sweeping claims can be furnished.

But, to discuss the issues in the order just suggested, attention is invited to the various acts of the Cherokee National Council relating to or throwing any light upon the status of the intermarried white citizen from the beginning.

The act of the Cherokee National Council of October 15, 1855, found at page 50 of the record, in its opening clause provides:

"Whereas the peace and prosperity of the Cherokee people require that in the enforcement of the laws jurisdiction should be exercised over all persons whatever who may from time to time be privileged to reside within the territorial limits of this nation, therefore * * * an 'unmarried' white man" * * * etc.

Throughout this entire act, which is one of much minuteness of detail, there is not one word indicating any intention upon the part of the Cherokee Nation to confer any property right whatsoever upon the intermarried white citizen. This act was passed in 1855, and was the first act of the Cherokee National Council on the subject of intermarriage with whites after the uniting of the two branches of the Cherokee family, Eastern and Western, and the adoption of the constitution of 1839. Considered in the light of the then

conditions, the Indian laws and customs, by which the grant of a landed interest was unknown except through the medium of a treaty, and the acts of Congress of 1834, providing that a citizen of the United States should not go into the Indian country without a passport, and that he was to be removed therefrom as an intruder, it is clear that the act of the Cherokee National Council of 1855 conferred a substantial right upon the intermarried white man by permitting him to reside in the Cherokee Nation. As a matter of history, the Cherokee Nation, shortly after the arrival of John Ross and the Eastern Cherokees in the present Cherokee Nation, enacted a law which provided the penalty of death against any Indian seeking to dispose of Indian lands, and that this penalty should be inflicted anywhere within the confines of the Cherokee Nation, by any citizen thereof, in the most convenient manner possible; and this, too, in the light of the fact that from 1808 the printed laws of the Cherokee Nation are in existence, presenting a clear, definite, and orderly system, applicable to their race and condition.

The act referred to is not only remarkable within itself, but be reason of being found in such a compilation. It goes to show the extreme anxiety of the Indian with regard to the subject of his lands and his desire to protect the remnant then remaining. The acts of Congress from 1834 and the treaty stipulations between the United States and the Cherokee Indians repeatedly agreed that the United States should remove from the Cherokee Nation all white persons save a small class mentioned in the various provisions. All bear testimony to the same unalterable purpose. Even as late as 1893, in the convention by which the Cherokee Outlet was ceded to the United States by the Cherokee Nation, there is set forth with much minuteness of detail the absolute promise upon the part of the United States to remove any unauthorized citizen of the United States from the Cherokee Nation upon the request of the principal chief thereof. It cannot be sound to say that because a man was privileged to reside in the Chero-

kee Nation and to acquire rights of citizenship, and because the Cherokee Nation exercised jurisdiction over him, that he should for these reasons have a share of the property belonging to the individual members thereof. It might as well be said that because a man marries into a family and has conferred upon him privileges incident to such a relation, and the right to live with them, possibly, that upon a subsequent division of the estate of his wife's family he could claim to be one of the heirs to that property.

The Cherokee act of 1855 stood unchanged until the adoption of the Code of 1874 by the Cherokee Nation, which carried a provision, in section 75 thereof, as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such admitted citizen shall pay into the general funds of the national treasury a sum of money to be ascertained and fixed by the National Council equal to the 'pro rata' share of each native Cherokee in the lands and vested wealth of the nation, estimated at five hundred dollars, and thereafter conform to the constitution of the nation, and the laws made or to be made in pursuance thereof, in which case he shall be deemed a Cherokee to all intent, and be entitled to all the rights of other Cherokees."

This provision of the code did not go into effect until November 1, 1875.

Record, page 51.

The National Council on the 28th day of November, 1877, passed the following:

"*Be it enacted by the National Council,* That chapter 13, article 15, section 75, of the new code laws be, and the same is hereby, amended so as to strike out of said section in the last proviso, from the words 'this nation' where said words end in the third line in said proviso of section 75."

So that said proviso, after this amendment, read as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation."

Record, page 52.

That is to say, all of that provision of section 75 attempting to confer property rights upon the adopted white citizen upon the payment of $500 therefor was repealed by express terms, leaving in force the express provision that the rights and privileges of the intermarried white should not extend to right of soil or interest in vested funds.

Without at this time discussing the question of the constitutional right of the National Council to pass any act conferring a property right upon a white intermarried citizen, under the constitution of 1839 and the amendments thereto of 1866, it may be fortunate for the Cherokee Nation that the privilege of purchasing a right in soil and funds, which remained a law for only two years, was inserted, for it was not only withdrawn (the record showing that only two persons, who are not parties to this suit, took advantage of said provision—Record, page 55), but after this attempt upon the part of the National Council to exceed its authority under the constitution, the act repealing the provision referred to left in the section in which said provision occurred the express words, as follows:

"*Provided, also,* That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation."

In the language of the Court of Claims in this case:

"The National Council enacted what was already the law by implication, an express proviso to section 75 of the Code of 1874, 'that the rights and privileges herein conferred (the right of white persons to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation.'"

This further shows that at the time the attempt was made by the Cherokee National Council to confer property rights upon the white adopted citizen, although it was so unpopular as to be repealed within two years, even in the mind of the council which passed the law the right was to be a *purchased* right, and the white adopted citizen taking advantage of it was required to pay into the national funds the sum of $500. There was no infringement of the constitution of the Cherokee Nation to say that the white man might become a citizen of the Cherokee Nation and reside therein and be subject to its laws; but he acquired no property rights thereby.

It is respectfully but earnestly urged that the conclusion of the Court of Claims that those Cherokees who married prior to the adoption of the Code of 1874-'75 are entitled to property rights in the Cherokee Nation is wrong and not justified by the court's own premise. The court says:

"Accordingly the National Council enacted what was already the law by implication, an express proviso to section 75 of the Code of 1874, 'that the rights and privileges herein conferred (the right of white persons to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation' * * * Whoever married after that enactment married with due notice of the limitation set upon his rights and privileges as a citizen."

But was notice necessary? If it was inserted out of abundance of caution, after the experience of the attempt upon the part of the National Council to confer property rights upon the intermarried citizen, it did not *create* a right in those marrying before the notice, when they had no such right theretofore. If the rights of the intermarried whites should not extend to soil or interest in the vested funds, and this was the law by implication before the use of those words, how could the mere giving of the notice in this way create a right which the intermarried citizen did not have before? One might post a notice today that no person should come into his yard and cut flowers. It would not follow that those who

had, without right, done so on yesterday would acquire a vested interest in the flower garden.

It is submitted that the view that the notice in the Cherokee statute, after 1877, was declaratory of what the law had always been, which was that the intermarried citizen should not take a property right, forces the conclusion that those who married prior to the Code of 1874-'75 are not entitled to the property right.

In 1880 the National Council passed a law for the purpose of taking a census. This was to be, and was approved as, a census. The descriptive matter was approved with the names. To illustrate, refer to page 60 of the record, showing the manner in which the admitted whites were enrolled:

Number.	Name.	Nativity.	Age.	Sex.
1970	Walker, Sarah A.....	White.....	23	F.

That this roll was a census roll appears from an inspection of the act authorizing all persons residing or sojourning in the nation to be enrolled thereon. The roll, when made, included in the census with those who were citizens and entitled to share the property the names of many persons who have never been recognized as members of the tribe, nor lawfully admitted as such. Further, the character of the act is illustrated by the following special act of the National Council, approved December 11, 1883:

"*Be it enacted by the National Council*, That the principal chief be and he is hereby authorized to have corrected the error in the registration of the name of W. D. Clingan on the authenticated census roll of Cherokee citizens, 1880-'81, said W. D. Clingan being registered on said roll for Cooweescoowee district, as an adopted white citizen, whereas the said W. D. Clingan is a well known and entitled Cherokee citizen by blood and descent, and to be so registered, as he has been before and since 1880; and the principal chief is authorized to direct and make the correction accordingly."

The reference by act of Congress to the 1880 roll will be discussed later, in connection with the claims of intermarried citizens as based upon the acts of Congress. Both before and after the taking of the 1880 census, the intent of the Cherokee National Council to confine the white adopted citizen to civil, political, and personal rights is manifest through special acts.

On the 29th day of November, 1878, the council passed the following act:

"*Be it enacted by the National Council,* That A. G. Greenway, a white man, and his two children, Alonzo and Minnie Greenway, be and are hereby readmitted into the rights and privileges of citizens of the Cherokee Nation: *Provided,* That the same rights and no other attach to A. G. Greenway than as an adopted citizen and (white) man in the Cherokee Nation."

Record, page 57.

On December 3, 1878, again:

"*Be it enacted by the National Council,* That David N. Allen, Mary Allen and Joe Allen be and are hereby readmitted to all the rights and privileges of Cherokee citizens."

Concurred in by council with the following amendment:

"*Provided,* That David N. Allen, the petitioner, shall not acquire any rights except such as attach to white men, adopted citizens of the Cherokee Nation."

Record, page 57.

In 1883 the council passed an act of which the following is the opening clause:

"*Be it enacted by the National Council,* That when the additional amount appropriated by the act of Congress of March 3, 1883, shall have been received by the treasurer of the Cherokee Nation, the principal chief shall cause the same to be paid out 'per capita' to the citizens of the Cherokee Nation by blood * * *."

Record, page 56.

There was, November 26, 1890, passed an act of National Council providing for distribution of proceeds of strip lands to Cherokees by blood only.

Record, page 57.

This latter provision is subjected to criticism by the claimants, in that the effort of the nation to confine the payment to Cherokees by blood was not successful in the cases of the Delawares, the Shawnees, or even the freedmen. This will be referred to later.

At this time it is desired to suggest that since the intermarried whites insist upon a construction of the act of the National Council of 1895 as a legislative construction of their rights, it is difficult to see in what way they can avoid the effect of the construction by the National Council of the Cherokee Nation, of 1883, 1886, and 1890, that they were not entitled to a property right in the Cherokee Nation.

This act of 1895 does not appear to be in the record, and this point is not waived; but if it is considered, it appears to be another instance of abundance of caution upon the part of the Cherokee Nation in trying to protect itself. The converse of the 1895 act should not be taken as true, that it was thereby intended to recognize property rights in those who married prior to the fifth day of December, 1895. It is but another declaration upon the part of the Indian (after the decision in the Journeycake case) that the white adopted citizen should not have property rights.

In the light of all of the legislation which precedes the Cherokee act of 1895, it is not hard to understand. It is clear that there was no intention to confer property rights upon intermarried white persons who married at any time. It was no attempted construction of previous acts. It was simply another declaration that the Indian did not want the white man to share his land. It may have been, and was, unnecessary; but that does not alter the case or warrant making that act the basis of an affirmative property right to the

intermarried white by inference. It is strange that, with all the acts and the treaties covering a period of half a century, these claimants at every point of contact are insisting upon taking something by some inference rather than by any express grant.

SECOND. THE CONSTITUTION OF THE CHEROKEE NATION.

Leading up to the adoption of the constitution of the Cherokee Nation of 1839, there is much history pertaining to the affairs of the Cherokee people, and especially during the years just preceding 1839. As early as 1808 the Cherokee people in the old nation east of the Mississippi river had separated, and some had gone west, into what is now Arkansas, and later, by the treaty of 1828, had been removed into the present Cherokee Nation, Indian Territory. It was after the treaty, so called, of New Echota, in 1835, that John Ross, the then chief of the Cherokees, East, commenced the forced removal of the Eastern branch of the Cherokee family to the west. There is much material for the historian and poet in the recital of the events of those times; but it is sufficient here to say that for eight years prior to the removal of the Eastern Cherokees by John Ross he had successfully baffled every effort of the Government of the United States looking to a cession of the lands of the Cherokees in the East. It was with an eye single to the preservation of the remnant of the lands in the Cherokee Nation, Indian Territory, that the two branches of the Cherokee family, the Eastern and the Western, reunited and formed the constitution of 1839. It was declared by this constitution that the lands should remain common property; but this is to be taken in connection with the then custom of the Indians; also the laws of Congress in force at that time, absolutely prohibiting the presence of any white person except those in the military service of the United States, and a few others named in the provision.

"SECTION 2134. Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent or subagent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

"SECTION 2135. Every person other than an Indian who, within the Indian country, purchases or receives of any Indian in the way of barter, trade or pledge, a gun, trap or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with white people, or any article of clothing except skins or furs, shall be liable to a penalty of fifty dollars.

"SECTION 2147. The superintendent of Indian affairs and the Indian agents and subagents shall have authority to remove from the Indian country all persons found therein contrary to law, and the President is authorized to direct the military force to be employed in such removal.

"SECTION 2148. If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars."

Act of Congress 30th June, 1834; Revised Statutes of the United States, pages 372-374.

Therefore this provision of the constitution contemplated that the lands should be the common property of the Cherokee Indians; and even here the constitution so jealously guarded the rights of the nation that it provided that those Cherokees who should remove with their goods and effects from the Cherokee Nation and become citizens of another government should forfeit all rights in said nation. But it did confer upon the National Council the power to *readmit*, by law, to all of the rights of citizenship any such person or persons who might at any time desire to return to the nation, on memorializing the National Council for such *readmission*.

There is no other provision of the 1839 constitution by which any power is vested in the National Council with regard to the readmission of persons theretofore members of the tribe. The Cherokees had studiously avoided intercourse with the white man, and the laws of the United States prohibited it. Even those who had once been members of the tribe could again become such only by memorializing the National Council. This provision limiting the right of the National Council to act upon the readmission of those only who had once been members of the tribe was clearly what was intended and is a manifest limitation on the power of the National Council to exceed that authority. Why should the council have conferred upon it the right to vote away the lands belonging to the members of the tribe or nation? The history of the Cherokee people had shown that they never parted with their lands except by solemn treaty, and in this constitution they declare that the treaties shall be the supreme law of the land. This constitution remained without change until the year 1866, when, in order to maintain their life as a nation, the Cherokees submitted to many measures well nigh in the nature of a revolution. The act of 1855 permitting marriages between the whites and the Indians had been passed by the Cherokee National Council, and the amendment of 1866 does mention as citizens of the Cherokee Nation all whites legally members of the nation by adoption, residing within the limits of the nation.

The amendments in 1866 to the constitution of 1839 did not in any way enlarge the authority of the National Council, as fixed in the constitution of 1839, relative to the adoption, or rather readmission, of members of the tribe or nation. The amendments did not confer or attempt to confer authority upon the National Council to create new citizens by the adoption of those intermarried or otherwise.

Speaking of those amendments, the Court of Claims said in this case:

"These constitutional amendments were brought about by the action of the United States at the close of the civil war

in dictating that the slaves or freed persons of color in the Cherokee country, should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. The Cherokees seem to have veiled their humiliation by these general declarations of the persons who should be taken and deemed to be citizens; but be that as it may, the overthrow of the Cherokee Nation and the treaty of peace, 1866, and the terms dictated by the United States, whereby their former slaves were made their political equals, and the common property of the Cherokees was to be shared in with their servants and dependents, was in effect a revolution. The constitutional amendment quoted was simply declaratory of the new order of things. It is not necessarily prospective, and does not impose limitations upon the legislative power with regard to the naturalization or future adoption of aliens as citizens. Under the polity of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Record, page 40.

It is another effort to acquire valuable property interests by an inference.

It is pertinent to inquire just what are the actual provisions of the constitution of 1839, and the amendments of 1866 and particularly the connection in which they occur and the subject-matter of section 5 of the constitution of 1839, as well as the amendment thereto, as found in "amendments to article 3, section 5."

Section 5 of the constitution of 1839 is as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council, but a free Cherokee male citizen, who shall have attained the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife according to the customs of this

nation, shall be entitled to all the rights and privileges of this nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or mother's side, shall be eligible to hold any office of profit, honor or trust under this government.

"SEC. 6. The electors and members of the National Council shall in all cases, except those of treason, felony or breach of the peace, be privileged from arrest during their attendance at elections and at the National Council in going to and returning."

Section 5, as amended in 1866, reads as follows:

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a *bona fide* resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

Laws of the Cherokee Nation, 1892, pages 14 and 33.

A quotation of *that part* of the amendment simply providing that whites legally members of the nation by adoption shall be deemed to be citizens of the Cherokee Nation does not disclose the true purview of the provision. It is found in that portion of the constitution relating solely to offices and elections, and the amendment was aimed at making certain changes in the original constitution as to who should be eligible to a seat in the National Council and does not in any way relate to the question of property rights. The subject-matter before the Cherokee people in this regard was purely political status and is shown to be such conclusively by the

full text of the provisions themselves, as well as that which goes before and that which follows.

The effort to construe the words "citizens of the Cherokee Nation," found in the connection just stated, so as to give to the claimants a valuable property right by seeking to make it relate to the original constitutional provision of 1839, that the lands of the Cherokee Nation should be common property, is too far-fetched to be argued. As a matter of fact it is worse than far-fetched. The contention is absolutely refuted by the provisions themselves.

When the Delawares and the Shawnees were incorporated into the Cherokee tribe it was not thought sufficient to simply say that they should be "taken and deemed to be citizens of the Cherokee Nation."

Cherokee Nation *vs.* Journeycake, 155 U. S., 196, 208.
United States *vs.* Blackfeather, 155 U. S., 180.

In case of the freedman it was specifically imbedded in the treaty itself that he should have all of the rights of the native-born Cherokee.

Moses Whitmire *vs.* Cherokee Nation, 30 Ct. Claims, 181.

Just here it may be pertinent to inquire what composes the citizenship of the Cherokee Nation, and how have those who have been determined to have acquired property rights gained them? Has it been by act of the National Council of the Cherokee Nation, or by act of Congress, or has it been by that method mentioned in the constitution of 1839 of the Cherokee Nation—that is to say, by treaty which that constitution recognizes as the supreme law of the land? The citizenship of the Cherokee Nation has been made up of the Cherokee Indians, the Delawares, the Shawnees, the white adopted citizens (meaning those persons who have intermarried with Indians by blood), and the freedmen, who were the slaves of the Cherokees. The lands originally in Decem-

ber, 1838, were patented to the Cherokee Nation, composed at that time of the Eastern and Western Cherokees. When the Delawares were incorporated into the Cherokee Nation, under article 15 of the treaty of 1866, between the United States and the Cherokee Indians, providing for the incorporation of friendly Indians, and when the Shawnees were in a like manner brought into the Cherokee Nation, each tribe paid the price in money into the national fund of the Cherokee Nation; but, more than that, when their rights were questioned each was able to turn to the treaties and point out the exact words upon which they relied and upon which they asked the court to pass judgment. And these were, with regard to the Delawares:

"For and in consideration of certain payments, and the fulfillment of certain conditions hereinafter mentioned, agree to sell to the Delawares for their occupancy, a quantity of land. * * * Nor shall the continued ownership or occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon citizens thereof. On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided. And the children born to such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

A similar provision was the basis of the Shawnees' right. The treaty of 1866, in the ninth article thereof, declared that the freedmen should have all of the rights of a native-born Cherokee.

In view of the history of how each component part of the citizenship of the Cherokee Nation acquired a property right therein, and of the express wording of the treaties, clearly defining the rights of each party in the lands of the Chero-

kee Nation, and considering the total absence of any such provision relative to the intermarried white citizens of the Cherokee Nation, how unfortunate is it for them to have invited comparison with the acquired rights of other members of the Cherokee Nation, and to have suggested that three times the Cherokee Nation had unsuccessfully invoked the distinction between a Cherokee by blood and other members of the tribe, who were Shawnees, Delawares, and freedmen. It can but accentuate the fact that the intermarried white citizen is the only person who has asserted a right which he cannot account for. It necessarily brings up the question as to why he has gone all of these years, throughout all of the payments of moneys made by the Cherokee Nation to every other citizen thereof, without asserting any claim, and that, too, when ever since the adoption of the Code of 1874-'75 there has been a continuous enabling act allowing any citizen of the Cherokee Nation to go into the courts thereof for the purpose of establishing any claim he might have against the nation.

"To get at the purpose and intention of the parties, we have a right to consider the construction the parties to the instrument, and who were affected by it, have given it, and what their action has been under it."

United States *vs.* Payne, 2 McCrary Rep., 295 (8 Fed., 888).

The United States has recognized the rights of the Cherokee Nation to make and construe its own laws as to who are entitled to citizenship therein, and the intermarried whites must stand upon the laws of the Cherokee Nation.

Talton *vs.* Mayes, 163 United States, 376.

Mehlin *vs.* Ice, 56 Fed., 19.

Cornells *vs.* Shannon, 63 Fed., 306.

This court has said:

"The Cherokees are governed by their own laws. As a

people they are more advanced in civilization than other Indian tribes, with the exception perhaps of the Choctaws."

Mackey *vs.* Coxe, 18 Howard, 102.

And again:

"The Cherokee Nation has many of the rights and privileges of an independent people. They had their own constitution and laws, and powers to administer their internal affairs."

Delaware Indians *vs.* Cherokee Nation, 193 U. S., 144.

It was said in Cherokee Trust Funds Case:

"If the Indians in that State, or any other State east of the Mississippi, wish to enjoy the benefits of the common property of the Cherokee Nation, in whatever form it may exist, they must, as held by the Court of Claims, comply with the constitution and laws of the Cherokee Nation and be *readmitted* to citizenship as there provided."

Cherokee Trust Funds Case, 117 U. S., 311.

The laws of the Cherokee Nation control and these laws have never conferred a property right on claimants.

Third. The Acts of Congress.

It is confidently asserted by the claimants that the act of Congress of July 1, 1902, ratified by the Cherokee Nation August 7, 1902, commonly called the Cherokee agreement, settles the question in their favor in positive terms.

The first portion of this act upon which they rely is as follows:

"Section 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

This is followed by a provision that "no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation," and by the further provision as follows:

"SECTION 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section 21 of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page 495), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page 221)."

"SECTION 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall from time to time, and as soon as practicable, forward to the Secretary of the Interior, lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which the allotment of land and distribution of other tribal property shall be made."

Act July 1, 1902 (32 Stat., page 716).

In the inception we find that the roll of citizens of the Cherokee Nation shall be made up as of September 1, 1902, and of persons then living and *entitled* to enrollment on that date. The following section provides that all persons living at the date mentioned, who are *entitled* to be enrolled as provided in the previous section, shall be placed upon the roll. And again, in section 29, we find that on the lists to be finally approved by the Secretary of the Interior there shall be placed only the names of those persons found to be *entitled* to enrollment. Thus the whole measure is qualified.

It is also provided that the roll shall, in other respects, be made in compliance with the acts of Congress of June 28, 1898, and of May 31, 1900. The act of June 28, 1898,

directs the Commission "to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living, whose names are found on said roll, * * * with such intermarried white persons as may be *entitled* to citizenship under the Cherokee laws."

Here the purpose of Congress is disclosed, to confine the beneficiaries to such persons as are *entitled under the laws of the Cherokee Nation*. Confirming the 1880 roll made by the Cherokees, which was a census roll, did not mean to create any rights which citizens of the Cherokee Nation had not before enjoyed. With reference to the act of June 28, 1898, this court has said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28th, 1898, a distinction between admission to citizenship merely, and the distributive share of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from a concession of the former."

Stephens *vs.* Cherokee Nation, 174 U. S., 488.

The Court of Claims, in speaking of this feature, says:

"It cannot be supposed for a moment that Congress intended by this legislation to take away from some of the Cherokee people property which was constitutionally theirs, or to confer upon white citizens property which they were not legally entitled to have. The term 'citizens' in these statutes of the United States must be construed to mean those citizens who were constitutionally or legally entitled to share in the allotment of lands."

Record, page 41.

The purpose of the confirmation by Congress of the 1880 roll is disclosed by all of the acts passed by Congress in this regard. It is clear that it was never intended to be anything more than a basis for making up a roll of citizens. The act

of 1898, section 21 thereof, is in reality a statement that no previous act of Congress is intended to confirm any other roll of the Cherokee Nation.

The words "authorized and directed" should be construed as directory and not mandatory.

"While words are affirmative and relate to the manner in which a power or jurisdiction vested in a proper officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and even have been construed to be directory."

Sutherland on Stat. Const., p. 447, and cases cited.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence, and it will always be presumed the legislature intended exceptions to its language which would avoid results of this character."

U. S. *vs.* Kirby, 7 Wall., 482.

Tsoi Sim *vs.* United States, 116 Fed., 926.

Holy Trinity Church *vs.* U. S., 143 U. S., 472.

"Literal language will be disregarded where it involves results not contemplated by Congress."

U. S. *vs.* Freight Asso., 166 U. S., 355.

Knowlton *vs.* Moore, 178 U. S., 77.

"The undoubted purpose of the statute as a whole should be the criterion."

Scott *vs.* Latmer, 89 Fed., 846.

Kohlsatt *vs.* Murphy, 96 U. S., 153.

"Exceptions may be presumed or words omitted or supplied when it is necessary to accomplish the obvious intent of the law-maker or prevent injustice."

Davis *vs.* Bohle, 92 Fed., 328, and cases cited.

In the case of Minnesota *vs.* Hitchcock, 185 U. S., 396, this court, after referring to Worchester *vs.* Georgia, *supra*, quotes from Choctaw Nation *vs.* United States,119 U. S., as follows:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the later is placed under the care and control of the former, and which while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes on the other hand such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

It will be borne in mind that the ratification by the Cherokee Nation of the act of Congress of July 1, 1902, was under the pressure of previous radical legislation by Congress shaking to the foundation the entire established order even to the national existence of Cherokee government. Particularly is this true of act of Congress of June 28, 1898.

On May 31, 1900, Congress again made reference to how these rolls should be made up by the Commission to the Five Civilized Tribes, and provided that the said Commission should not receive or entertain the application of any person who had not theretofore been placed upon some roll of the Cherokee Nation. There was the 1880 roll, made eighteen years prior to the passage of the 1898 act, on the one hand, and there was the constitutional limitation in the Cherokee constitution that all persons, whether on the 1880 roll or not, who removed from the nation, taking all their goods and effects, and who should become the citizens of another government, should forfeit all rights in the Cherokee Nation; and it cannot be said that Congress had either the power or the intention to rehabilitate such as had forfeited their rights.

Section 31 of the act of July 1, 1902, says that no person whose name does not appear on the roll to be made by the Commission to the Five Civilized Tribes "shall be entitled to

in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

In other words, the roll must be made up of citizens who *under the laws of the Cherokee Nation* are entitled to participate in the distribution of the common property of the Cherokee tribe. So we return to the point from which we started, that the intermarried citizen must found his claim in the laws of the Cherokee Nation. It is clear that the claims of the intermarried citizens winnow to the proposition that they have been given this right by recent acts of Congress. They know that they are confronted by half a century's acquiescence in the condition that they have not enjoyed property rights or any other than personal, political, and civil rights, and that in the face of a continuous act of the Cherokee Nation, in force ever since the Code of 1874-'75, enabling them to assert any rights which they claimed. They know that during all of the series of events which culminated in the payment of the Shawnees, the Delawares, and the freedmen of the *per capita* of each in the funds derived from the sale of the Cherokee Outlet they did not once assert any claim in themselves. It is strange that after a lapse of fifty years they should thus appear and rest their case upon some recently made enactments of Congress, alleged to give them rights which they have not before enjoyed.

The statement was made in the Court of Claims:

"It is, and has always been, not only the custom of the Cherokees, but of all Indian tribes, to adopt white men as members of their tribes, and in most if not all cases, membership carries with it the rights enjoyed by members by blood."

Brief on behalf of claimants, page 184.

Did anybody ever hear of a claim of intermarried citizens put forth by that class in the Creek or Muskogee Nation in the Indian Territory, or by the Cherokee Nation, until based

on these recent acts of Congress, providing for the dissolution of the nation and the distribution of its property? Have counsel ever stopped to consider what the Choctaws and Chickasaws in the Indian Territory based their claim upon? With regard to these nations it is by *treaty* distinctly set forth in article 26 as follows:

"The right here given to the Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarried, of either of said nations, or who may *hereafter* become such."

And further, article 38:

"Every white person who, having married a Choctaw, or Chickasaw, resides in the Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw or Chickasaw Nation, according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw."

There those Indians provided for property rights in one paragraph of the treaty, and for political rights in another. If the Cherokee Nation had intended to confer a right in the lands and vested funds thereof, upon the intermarried white citizens, does it not seem somewhat remarkable that they have never said so? As when dealing with the laws of the Cherokee Nation the claimants have been compelled to rely upon construction, so when their claim, based upon the recent acts of Congress, is sifted, it comes down to the same point. Scrutinize their construction of the act of 1902, and how can it be made anything more than an inference which they urge in favor of themselves?

But it is insisted that the act of 1902 was a treaty. Certainly it was not an instance where the two parties met in convention, as of old, but when Congress had passed the act

and submitted it to the Cherokee Nation, with the clause relied upon by the claimants in it, it was by the Cherokee Nation ratified, but it would not have been but for the vote of the intermarried white citizen. Then it follows that he voted to himself whatever benefits might accrue under this act (Record, page 60). Certainly as affecting this question this cannot be called a treaty.

Going back to the history of the acts of the Cherokee Nation itself, and gleaning therefrom its attitude upon the question of the desire of the white man to share in the lands and moneys of the Cherokee Nation, it is improbable that the act of Congress passed July 1, 1902, would have been ratified by the Cherokee Nation if it had been more clear then that the white intermarried citizen expected to make this the basis of his claim to a distributive share in the lands and moneys of the nation, which up to that time had been withheld from him.

But look at the provision itself. True it may be said that there is no use in saying that a citizen married since the sixteenth day of December, 1895, should not participate in the distribution of the lands and funds of the nation, if a citizen married before that date was not to do so; but admitting this suggestion for all it is worth, it must also be agreed that it is a very poor form for a land grant. If these claimants had no other claim until the passage of that act, and must take the clause in that conversely in order to acquire a property right not before enjoyed, the weakness of their position is exposed. There is one thing certain, that provision of that act of 1902 will never be any more clear than it was then made. Will this court say that such an act submitted to the Indians in such a way is sufficient upon which to base a judgment which would take from them approximately 300,000 acres of land, to say nothing of the fund?

Unless the decisions of this court to the effect that language should never be construed to the prejudice of the Indians are to be departed from it is difficult to see how these claimants

can hope to acquire by construction valuable property rights which it is manifest the Indians never intended to confer.

Worchester *vs.* Georgia, 6 Peters, 515, 582.
United States *vs.* Kagama, 118 U. S., 375.
Jones *vs.* Mehan, 175 U. S., 11.
Minnesota *vs.* Hitchcock, 185 U. S., 396.
Choctaw Nation *vs.* U. S., 119 U. S., *supra.*

"Married Out and Abandonment Cases."

Referring to the claim denominated "Married out and abandonment cases," that point seems to be fully concluded against the claimants in the following language:

"To say that a white man can share in the property of the Cherokees for the reason that at one time in his life he was the husband of a Cherokee woman, and to say that this court or the Secretary of the Interior must hold that he is still the husband of the Cherokee woman because the contrary has not been established in another proceeding, is an appeal to technicality which this court cannot uphold. These claimants like other plaintiffs must prove their case; asserting a present right, they must establish present conditions. The laws and usages of the Cherokees, their earliest history, the fundamental principles of their national policy, their constitution and statutes, all show that citizenship rested on blood or marriage; that the man who would assert citizenship must establish marriage, and that when marriage ceased, with a special reservation in favor of widows and widowers, citizenship ceased; that when an intermarried white person married a person having no rights of Cherokee citizenship by blood, it was conclusive evidence that the tie which bound him to the Cherokee people was severed, and the very basis of his citizenship obliterated."

Record, page 42.

There is in this point additional evidence of how the Cherokees guarded their estate. When the wife or husband of the white intermarried citizen died, the widow or widower forfeited the right to reside in the Cherokee Nation, if he

married again any other than an Indian by blood. At first this might, in a given instance, seem harsh. Take the case of a white man and a white woman, both of whom had become by the marriage laws of the Cherokee Nation entitled to reside there, and who had made that country their respective homes. If they married each other, why should they forfeit the right to live in the Cherokee Nation? And yet from the Indian viewpoint the reason is obvious. The right of the children of those persons to so reside would follow. The Indian did not intend to accord even the slightest recognition to any person other than an Indian, except *while* the husband or wife of an Indian.

Compilations of 1880 to 1892.

The clause "Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation" has been said by counsel for the intermarried citizens to have been repealed, and that the requirement for the payment of five dollars additional, found in the act of 1880, was enacted in its place. It is believed that some impatience may be confessed and excused as to this argument. If the act of the National Council, leaving aside the question of the constitutionality of that act, which attempted to confer a right in the lands and vested funds of the Cherokee Nation upon the payment of $500, was so unpopular as to force its repeal within two years, it ought not to be urged that three years later the same right was conferred upon the payment of five dollars.

The proviso above referred to, expressly giving notice, if it may be so termed, that the rights and privileges "shall not extend to right of soil or interest in the vested funds of this nation," has been the law of the Cherokee Nation ever since November 28, 1877, as is undeniably shown by the record.

Some discussion was indulged in in the Court of Claims about the compilations of 1880 to 1892, but it does not appear to be important here. The action of the compiler of the acts

of the National Council, published in 1881, in omitting a part of section 75 of the Code has been spoken of. The fact that he ended the section with the identical words referred to in the amendment, although not at the right place, indicated that it was an unintentional error.

The act providing for this collection or compilation of the laws contained no provision making them effective as the laws of the nation when so collected and compiled, nor did the National Council have power itself to delegate its legislative functions. It was not a code of laws, under and by authority of the National Council. The work of the compiler was required to be approved before the chief issued the warrant for his compensation, and not to make the collection any more effective as law, because the chief alone could not make or change the law. The same may be said of the compilation of 1892. This collection was provided for by an act practically identical with that of 1880. The same compiler was selected, and the error in this chapter was not corrected. His work in this compilation consisted of adding to the compilation of 1880 the laws and amendments which had been passed by the National Council since it was made, and left it otherwise unchanged. Neither did the act providing for this collection or compilation provide that it should, when made, become effective as the law. Doubtless they were accepted and admitted as correct; but wherever it could be shown an error had been committed by the compiler, the original act of the legislative body, approved by the executive, was and is the law beyond any question. But it is useless to argue this.

In the language of Mr. Chief Justice Nott, in the Court of Claims in this case:

"In 1874 the rapidly growing value of the Cherokee lands was becoming perceptible. * * * No restrictions appear to exist in the constitution which would forbid the National Council from admitting white men to citizenship upon the condition that they should not acquire an estate or interest in the communal property of the nation. Accordingly the National Council enacted what was already the law by im-

plication, an express proviso to section 75 of the Code of 1874 'that the rights and privileges herein conferred (the right of white citizens to acquire citizenship by intermarriage) shall not extend to right of soil or interest in the vested funds of this nation;' which provision, however did not take effect until November 1, 1875."

Record, page 39.

It will be borne in mind that all of that part of the provision of section 75 following the words "this nation," giving the right to the intermarried citizen upon the payment of $500 to acquire a property right in the said nation, was struck out by the amendment of November 28, 1877, and that the law has so remained, unchanged, from that date.

In so far as the judgment of the Court of Claims contravenes the laws of the Cherokee Nation and the acts of Congress providing that only those who are entitled to participate in the distribution of the property of the Cherokee Nation by virtue of its laws, and which adjudges and decrees that such white citizens residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood prior to the first day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee Nation, and in any funds derived by lease, sale or otherwise from the lands of the Cherokee Nation, conveyed to it by the United States by the patent of December, 1838, it should be modified so as to hold that none of such intermarried white citizens are entitled to share in the funds and lands of the Cherokee Nation, whether married prior to or subsequent to the first day of November, 1875, and as so modified it should be affirmed.

EDGAR SMITH,
Attorney for Cherokee Nation.